92-1690

APR 19

No. 93-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JOSEPH P. BALISTRIERI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. May a property owner be liable under Title VIII for discriminating in the terms and conditions of renting his apartments in the absence of a showing that a potential occupant was both interested in and qualified to rent from him?

2. May "testers," who falsely represent themselves as potential tenants and solicit information about rental properties for the sole purpose of uncovering evidence of discrimination against others, themselves recover damages from the property owner for emotional distress?

PARTIES IN COURT BELOW

Other than the petitioner and respondent, Angelina Hurdelbrink was a defendant before the district court and an appellant-cross appellee before the United States Court of Appeals for the Seventh Circuit.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Joseph P. Balistrieri respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above proceeding on November 24, 1992.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 981 F.2d 916 (1992) and is reprinted as Appendix A to this petition (App. 1a-27a).

JURISDICTION

The decision of the Court of Appeals was entered on November 24, 1992. A timely petition for rehearing was denied on January 20, 1993. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title VIII of the 1968 Civil Rights Act, 42 U.S.C. §§ 3601 et seq. ("Title VIII"), attached in relevant part as Appendix B (App. 60a-71a) to this petition.

STATEMENT OF THE CASE

Joseph P. Balistrieri is the owner of an apartment building in Milwaukee, Wisconsin, called the Shorecrest Hotel. For an approximately eight-month period during 1988 and 1989, Angelina Hurdelbrink worked part-time at the Shorecrest as a rental agent.

During a six-week period in mid-1989, the Milwaukee Metropolitan Fair Housing Council conducted five "tests" of rental practices at the Shorecrest. A Fair Housing Council representative would telephone the Shorecrest under an assumed name, ask whether a particular size apartment was available and what the rent would be, and

would then make an appointment to see the specific apartment or apartments discussed. A "tester" using the same name as the caller would show up for the appointment, view the apartment or apartments, and purport to ask a second time about the rent. The testers, who had conducted as many as 100 previous investigations, provided Ms. Hurdelbrink with fabricated addresses, family situations, employment and financial information, and stories about why and when they were interested in moving. The testers also recorded their conversations with her on concealed tape recorders. Prior to going to the Shorecrest, the testers had been provided by the Fair Housing Council with information about the building and its amenities.

The rents for any of the 116 apartments at the Shorecrest were variable within a range, depending on size, loca-

tion in the building, condition, view, and whether it was to be furnished or unfurnished. Not surprisingly, given the range of rent which might be charged for any given unit, the Fair Housing Council representative who made the appointment and the testers were sometimes quoted different rents for the same apartment. Thus, some black testers were quoted different rates than other black testers, some white testers were quoted different rates than other white testers, some black testers were quoted higher rates than white testers, and some white testers were quoted higher rates than black testers. None of the testers filled out applications, asked to be placed on a waiting list, or were rejected as tenants by the Shorecrest.

On January 8, 1990, the United States, as plaintiff, filed an action

against Petitioner and Ms. Hurdelbrink in the United States District Court for the Eastern District of Wisconsin, asserting jurisdiction pursuant to 28 U.S.C. § 1345 and 42 U.S.C. § 3614(a). According to the complaint, the defendants had engaged in a pattern and practice of discriminating against black persons in rental practices at the Shorecrest. During discovery, the United States identified as "aggrieved persons" within the meaning of Title VIII the five black testers, the Fair Housing Council, and two black individuals who had inquired about possibly renting an apartment at the Shorecrest. Neither the testers, the Fair Housing Council, nor the two potential tenants intervened in the action.

The action was tried to a jury, which found that the defendants were liable on the claims of the United States. While

none of the five black testers testified to any out-of-pocket or economic damages, they were awarded damages for the emotional distress they purportedly suffered when, months after they "tested" the Shorecrest, they were told by the Fair Housing Council that they had been treated differently from the five white testers.

The defendants appealed the judgments against them, which were affirmed by the Court of Appeals for the Seventh Circuit. Two aspects of the decision on appeal require emphasis: (1) the rejection of the defendants' position that the government had failed to prove, as an essential element of a pattern and practice of discrimination in the terms and conditions of rental, that any tester was willing and qualified to rent at the Shorecrest, United States v. Balistrieri, 981 F.2d 916, 929 (7th Cir. 1992); and (2) the recovery

of damages for emotional distress by the five black testers notwithstanding their willing participation in the tests and their testimony that their distress occurred months later and only in response to the Fair Housing Council's telling them that they were the victims of discrimination. Id. at 931-33.

REASONS FOR ALLOWANCE OF THE WRIT

The basic principles of fair housing are well known. The right to fair housing is the right to live in an integrated community. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210-11 (1972). It is the right of a consumer of housing to buy or rent a home where he or she chooses. See Asbury v. Brougham, 866 F.2d 1276, 1279 (10th Cir. 1989). And it is the right of a citizen, either as a paid employee or a concerned volunteer, to obtain accurate information about the

availability of housing in his or her community. Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-74 (1982).

The Seventh Circuit has gone well beyond these basic principles. Under the logic of its decision, fair housing is a right to live in a specific apartment, rather than in a specific apartment building. It is a right to claim that one was denied an apartment that one had no intention of renting, to object to rent that one never paid, or to complain that one was not informed of facts of which one already was aware. And it is a right to willingly seek information and then recover monetary damages on the rationale that one's sensibilities were bruised by precisely the information for which one was looking.

Petitioner was determined to have engaged in a pattern or practice of hous-

ing discrimination against people who were looking, not for housing, but for evidence of discrimination. No tester was told falsely that an apartment was unavailable, which is the only legally recognized cause of action available to a tester. Nor did the testers provide evidence at trial to establish discrimination against bona fide apartment seekers or assert claims on behalf of others as private attorneys general, functions that have been recognized as legitimate for testers. Instead, the purported discrimination was against the five testers for alleged discrimination against them in their role as investigators. Their testimony was held sufficient to establish a pattern and practice of discriminating against bona fide applicants and actual tenants.

There are two principal reasons to grant a Writ of Certiorari in this case.

First, the opinion of the court below is fundamentally at odds with the decisions of this Court and other courts of appeal concerning the requisite elements of and burden of proof applicable to civil rights cases. Second, this Court has not yet defined the damages that any "aggrieved person" may recover under Title VIII, other than to indicate that they be determined in accordance with common law tort principles, a directive not adhered to in this decision. In view of the differing forums in which Fair Housing actions may be asserted, the recent legislation authorizing federal funding of testing, and the inconsistency of the decision below with the recognized legitimate function of testers as objective and reliable investigators, this Court should articulate a consistent federal common law standard for

the ascertainment of damages under Title VIII.

I. THE SEVENTH CIRCUIT HAS EXPANDED THE SCOPE OF A TITLE VIII CLAIM BEYOND WHAT THIS COURT AND OTHER COURTS OF APPEAL HAVE DETERMINED TO BE APPROPRIATE.

Title VIII provides that four types of conduct, if based on impermissible characteristics, are unlawful:

(a) refusing to enter into or negotiate with respect to a real estate transaction, § 3604(a);

(b) differing in the terms and conditions of real estate transactions, § 3604(b);

(c) indicating in advertisements or otherwise an inclination to deal with certain categories of people, § 3604(c); and

(d) providing false information about whether housing is available, § 3604(d).

In Havens, this Court held that testers, "who, without an intent to rent or purchase a home or apartment, pose as

renters or purchasers for the purpose of collecting evidence" of violations of Title VIII, have standing to bring a false information claim under § 3604(d). Havens, 455 U.S. at 373-74. The Court declined to extend to testers standing to bring a refusal to deal or negotiate claim under § 3604(a), stating that such a claim could only be asserted by a bona fide offeror. Id. at 374. The Department of Housing and Urban Development ("HUD") apparently concurs with the view that testers may only bring a false information claim under § 3604(d), since it has specifically recognized the role of testers as potentially "aggrieved persons" only in that context. 24 C.F.R. § 100.80(b)(5) (1992), attached as Appendix C (App. 72a-74a).

In Petitioner's case, black and white testers who posed as potential tenants were not only all told that apartments

were available, they frequently were shown precisely the same ones. Nonetheless, the Seventh Circuit exploded the concept of tester "rights" beyond the view endorsed by this Court in Havens, 455 U.S. at 373-75, and, by combining the "false information" concept of § 3604(d) with the "terms and conditions" language of § 3604(b), concluded that the government could recover damages on behalf of a tester who was provided any different information about a building or an available apartment than the specific tester with whom he or she was paired. This was (a) regardless of whether other testers of like or different race were provided the same information and (b) without producing any evidence that information given to any bona fide potential tenant did not similarly vary, i.e., that the rents were not, indeed, established by range. Thus, according to

the Seventh Circuit, one need not actually be a tenant to claim that one was treated unequally as a tenant.

As a starting point, the decision in this case runs afoul of what the Court has indicated to be a tester's legally protected interest, which is to know with accuracy whether a housing opportunity is available. Havens, 455 U.S. at 373. This reflects both the role of testers as representatives of the public interest, Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir. 1990), and what this Court has acknowledged to be the primary public policy behind Title VIII, i.e., assuring that communities are integrated. Trafficante, 409 U.S. at 211. However, a tester, who has no genuine interest in becoming a resident in a given building or neighborhood can have no personal stake in the specific terms of such residency. Accord-

ingly, a tester, as only a hypothetical prospective resident, cannot allege the sort of distinct, palpable, personal injury from the terms of rental that this Court has required in order to permit an individual to assert a Title VIII claim. Havens, 455 U.S. at 372-74.

This Court has yet to address the precise elements a plaintiff must establish to prevail in a Title VIII action. It has done so, however, with respect to the parallel federal statute prohibiting discrimination in employment, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e) et seq. ("Title VII"), attached in relevant part as Appendix C (App. 72a). A plaintiff in an employment discrimination case must demonstrate as a prima facie case that: 1) he or she belongs to a protected class; 2) he or she applied and was qualified for a position for which

the employer was seeking applicants; 3) despite his or her qualifications he or she was rejected; and 4) the position remained open and the employer continued to seek applicants. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). This standard was refined in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 366-68 (1977), to reflect that a plaintiff who actually knew it would be futile to, and therefore did not, apply might still establish a prima facie case; however, the Court has at all times required that a plaintiff establish both qualification and actual interest in the job in order to recover under Title VII. Accordingly, for recovery in a Title VII class action, it is not enough that a defendant's pattern and practice of discrimination be proved; this Court further requires that each of the prevailing class

members actually wanted the jobs at issue and possessed the requisite qualifications. Id. at 369 n.53. The reason for this is apparent: one could not have been deprived at all, much less deprived in violation of one's civil rights, of that which one would not have obtained in any event. Carey v. Piphus, 435 U.S. 247, 260 (1978).

Recognizing the parallels between the statutes, the courts of appeal have held that Title VII precedent is equally relevant to Title VIII. See, e.g., Huntington Branch, NAACP v. Huntington, 844 F.2d 926, 934 (2d Cir. 1988), aff'd per curiam, 488 U.S. 15 (1988); United States v. Di Mucci, 879 F.2d 1488, 1497 & n.12 (7th Cir. 1989). Courts have also consistently recognized the applicability of the McDonnell Douglas standard to Title VIII actions, and require a plaintiff to establish the

equivalent threshold prima facie case, including as essential elements that he or she applied for and was qualified to purchase or rent the property at issue. See, e.g., Asbury, 866 F.2d at 1279-80; Pinchback v. Armistead Homes Corp., 907 F.2d 1447, 1451 (4th Cir. 1990) ("futile gesture" doctrine applies to Fair Housing case, but plaintiff still must prove actual interest and qualification), cert. den., 498 U.S. 983 (1990). This fundamental requirement also has been explicitly recognized by HUD. United States v. Badgett, 976 F.2d 1176, 1178 (8th Cir. 1992).

Since the government could not establish that any tester was told that an available apartment at the Shorecrest was unavailable, its "pattern and practice" case was based entirely on black testers having been provided in some cases with

higher rental quotes or differing availability dates than their white counterparts--regardless of whether they were provided the same or more favorable data than other Fair Housing Council testers. When the Seventh Circuit allowed the testers to recover for discrimination in the terms and conditions of rental, notwithstanding the absence of proof that they were either qualified for or interested in renting any apartments, it, in essence, concluded that an individual could complain of discrimination, not only in the opportunity to become a tenant, but in the actual terms and conditions of a relationship into which he or she never entered. Under the plain terms of Title VIII, the McDonnell Douglas standard, and the fundamental rule of law that one does not lose what one does not have, a tester is necessarily precluded from contending that he

or she was deprived of anything other than the § 3604(d) right to accurate information as to availability. A tester may not recover under the provisions of Title VIII relating to refusal to deal or negotiate, § 3604(a), Havens, 455 U.S. at 374, or, obviously, for disparate treatment in the terms of a commercial relationship to which the tester never was a party, § 3604(b).

Why, then, in light of both the contravailing authority and the patent illogic of permitting testers to recover damages as though they were actual tenants, did the Seventh Circuit hold as it did? It did so on the basis of a cursory comparison of two sections of Title VIII: § 3604(b) (discrimination in terms and conditions of rental) and § 3604(d) (false information about availability), reasoning that, since both sections proscribed ac-

tions being taken against "any person" on the basis of an impermissible characteristic, any person--including a tester--could bring a claim under either section. Balistrieri, 981 F.2d at 929. By such reasoning, the Court ignored that this Court declined in Havens to conclude that a tester could assert a claim under § 3604(a) (refusing to deal or negotiate), although § 3604(a) contained the identical prohibition of actions against "any person." Havens, 455 U.S. at 374. Moreover, HUD regulations, which describe the agency's view as to conduct violative of Title VIII, mention testers in one context only: false statements as to availability of housing. 24 C.F.R. § 100.80(b)(5) (1992) (App. 72a-74a).

Title VII, the parallel statutory protection against discrimination in the terms and conditions of employment, con-

tains substantially identical language that certain actions may not properly be undertaken against "any individual." 42 U.S.C. § 2000e-2(a)(1) (App. 72a). Nonetheless, Title VII has never been extended to cover a spurious applicant, as opposed to an actual one. Indeed, the authority is to the contrary: a person who interviews for a position without genuine interest in taking it is not a bona fide applicant and cannot establish a prima facie case of discrimination in the terms and conditions of employment he never intended to accept. Parr v. Woodmen of World Life Ins. Soc., 657 F. Supp 1022, 1032 (M.D. Ga. 1987). Such "test" plaintiffs are not, and could never be, harmed by a refusal to hire since they were never seriously interested in and never intended to accept employment. Sledge v. J.P. Stevens & Co., 585 F.2d 625, 641 (4th Cir.

1978), cert. den., 440 U.S. 981 (1979); Parr, 657 F. Supp. at 1032.

The import of the Seventh Circuit decision is both clear and frightening. To permit the sort of evidence, on the basis of which Petitioner was found liable, to suffice for a Title VIII pattern and practice claim, is to tie the hands of any property owner in terms of his ability to set prices, negotiate, or do anything other than give verbatim information and lockstep tours of his property to any potential tenant or purchaser. More fundamentally, for purposes of this Petition, to permit the Seventh Circuit's decision to stand would allow inconsistency among the circuits with respect to the adjudication of civil rights claims.

II. THE DECISION THAT TESTERS MAY RECOVER DAMAGES FOR EMOTIONAL DISTRESS RAISES IMPORTANT AND UNRESOLVED QUESTIONS OF FEDERAL COMMON LAW.

While obviously uncomfortable with the notion that emotional damages could have been suffered by individuals who, as a regular practice, willingly make inquiries to see if they, as black persons, might be treated improperly, the Seventh Circuit nonetheless allowed such damages, with no instruction of the jury as to their requisite elements, on the basis that the testers said they were upset. Balistrieri, 981 F.2d at 932-33.

To date, this Court has not articulated the circumstances under which emotional distress is compensable under Title VIII, although it has held that a damage action under Title VIII sounds basically in tort. Curtis v. Loether, 415 U.S. 189, 195 (1974). Further, according to the

Court, damages in civil rights actions are to be determined in accordance with ordinary tort principles. Carey, 435 U.S. at 257-58. Allowing testers who willingly sought information about the Shorecrest under false identities and pretenses to recover for emotional distress because, long afterwards, they were told they had succeeded in finding evidence of disparate treatment is contrary to a panoply of established principles of tort law. It also ignores the nature of a tester's legally protected right, which is the right not to be lied to about whether housing is or is not available for occupancy. Havens, 455 U.S. at 373-74.

The Restatement (Second) of Torts, which this Court has recognized as a proper authority with respect to determining damages, Smith v. Wade, 461 U.S. 30 (1983) establishes that litigants cannot recover

damages for intentionally caused emotional trauma absent both (a) outrageous conduct and (b) severe emotional distress. Restatement (Second) of Torts § 46(1)(1977). In addition, to be compensable, emotional trauma must be both justified and reasonable under the circumstances. Id., cmt. j. None of those requisites were satisfied in this case, since the testers were each treated with courtesy, shown available apartments, and went to the Shorecrest specifically to deceive the defendants and see if discriminatory activity was occurring. If the testers had actually been provided false information about whether the units were available, they may properly have recovered out-of-pocket expenses or even nominal damages. At the same time, their choice to repeatedly seek out potentially discriminatory treatment makes any claim of emotional trauma plain-

ly foolish and, under the Restatement (Second) of Torts, unsupportable.

There are three principal reasons why this Court should provide guidance to the lower courts with respect to the circumstances under which damages for emotional distress may be recovered under Title VIII. First, the number of forums in which such actions may be brought requires uniformity of precedent in the interpretation of Title VIII, since a fair housing action may be asserted in either state or federal court, §§ 3613(1)(a), 3614(a), or before an administrative law judge, § 3612(a), (b). Second, the frequency of Title VIII litigation further warrants this Court's guidance. Between March 1989 and early 1991, the Department of Justice alone filed 70 civil suits based on Title VIII violations. Joseph D. Rich, Enforcement of the Fair Housing Act, as Amended,

by the Department of Justice, 46 Bus. Law 1335, 1337 (1991). The volume of litigation, and need for uniformity, will only increase with the expansion of testing programs through congressional funding under the Fair Housing Initiatives Program, which authorizes HUD to administer such funds to private organizations. See 24 C.F.R. §§ 125.101, 125.401, 125.403(b), (App. 74a-75a).

Third, the societal importance of the Fair Housing legislation calls for this Court to provide clear direction to property owners, property seekers, and enforcement agencies, and to protect the legitimate investigation of housing discrimination. For a tester to recover damages for emotional distress is at odds with a tester's proper role as an objective, dispassionate observer who investigates discriminatory conduct for the bene-

fit of others. Richardson v. Howard, 712 F.2d 319, 322 (7th Cir. 1983). Transforming the role of testers from objective investigators to litigants with a personal stake in the outcome of an action not only departs from the intent of testing programs, but negates their value to proper enforcement of Title VIII.

CONCLUSION

For the reasons stated the petition for a writ of certiorari to the United States Court of Appeals for Seventh Circuit should be granted.

Dated at Milwaukee, Wisconsin, this 19th day of April, 1993.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 91-2379 and 91-2493

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Cross-Appellant,

v.

JOSEPH P. BALISTRIERI and
ANGELINA J. HURDELBRINK,

Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 90 C 27—Thomas J. Curran, *Judge.*

ARGUED APRIL 14, 1992—DECIDED NOVEMBER 24, 1992

Before RIPPLE and MANION, *Circuit Judges*, and WILL, *Senior District Judge.**

MANION, *Circuit Judge.* The United States sued Joseph Balistrieri, owner of the Shorecrest Apartments in Milwaukee, and Angelina Hurdelbrink, his rental agent, alleging that Balistrieri and Hurdelbrink committed discriminatory

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* Hon. Hubert L. Will, Senior District Judge for the Northern District of Illinois, is sitting by designation.

rental practices in violation of the Fair Housing Act, 42 U.S.C. §§ 3601-19. A jury found for the government and awarded damages to several aggrieved individuals and to a Milwaukee fair housing organization, the Metropolitan Milwaukee Fair Housing Council (MMFHC). The district court subsequently imposed an injunction on Balistrieri and imposed civil penalties on him and Hurdelbrink. Balistrieri and Hurdelbrink appeal, raising a plethora of issues regarding liability, damages, and the propriety of injunctive relief; the government cross-appeals the district court's decisions not to allow it to seek damages for two other people and to remove the issue of punitive damages from the jury. We affirm in part and reverse in part.

I.

"Testing" is a method used by organizations such as the MMFHC to ferret out discriminatory housing practices. In conducting a test, the MMFHC sends two people posing as customers, one white and one black, to a realtor, home, or apartment complex. The two people would be as close to identical in distinguishing characteristics other than race—for example, age and marital status—as possible. The two would inquire about the identical type of housing. Differences in response to the two testers—for example, quoting higher prices to a black, or giving the two testers different stories about the availability of an apartment—could indicate discrimination.

The MMFHC decided to perform a test at the Shorecrest Apartments. The test was not prompted by any complaints about discrimination but rather was intended to provide a new tester the opportunity to conduct a test. Carla Herbig, the new tester, who is black, went to the Shorecrest at about 5:30 p.m. on April 25, 1989, and met with Hurdelbrink. After Herbig told Hurdelbrink she was interested in a one-bedroom apartment for May or June, Hurdelbrink showed her apartment 321 and told her the rent was $500 per month. Hurdelbrink did not show Herbig any other facilities in the building.

The next day, Kate Lonsdorf, who is white, visited the Shorecrest. Like Herbig, Lonsdorf told Hurdelbrink she was interested in a one-bedroom apartment for May or June. Hurdelbrink showed Lonsdorf the same apartment she showed Herbig, but told her the rent was $480 per month. Hurdelbrink also showed Lonsdorf the building's storage and laundry facilities and told Lonsdorf about the building's restaurant.

After reviewing the results of this test, Carla Wertheim, MMFHC's associate director, suspected discrimination and decided that more tests would be appropriate. Thus, on April 29, Kim Davis, who is black, visited the Shorecrest and told Hurdelbrink she wanted a two-bedroom apartment. Hurdelbrink responded that no two-bedroom apartments were available. However, Hurdelbrink did show Davis a three-bedroom apartment and told her the rent was $850 per month. Hurdelbrink also told Davis that she might have some two-bedroom apartments after June, for which the rent would be $850 per month.

About one hour after Davis left, Lynn Connolly, a white tester, arrived at the Shorecrest. Connolly, like Davis, told Hurdelbrink that she was looking for a two-bedroom apartment. Hurdelbrink told Connolly that no two-bedroom apartments were currently available. However, Hurdelbrink did show Connolly an office that was to be converted into a two-bedroom apartment that would be available June 1 for $700 per month. Hurdelbrink also showed Connolly a vacant three-bedroom apartment and told Connolly that the apartment could be converted to a two-bedroom apartment which would rent for $875 per month. When Connolly asked about an application, Hurdelbrink gave her one.

On May 5, Carol Cunningham, who is white, met with Hurdelbrink at the Shorecrest and told Hurdelbrink she was interested in a one- or two-bedroom unit. Hurdelbrink showed Cunningham a two-bedroom unit on the eighth floor with a quoted rent of $850 per month, a one-bedroom apartment on the second floor with a quoted rent of $475

per month, and a one-bedroom apartment (with no rent quoted) on the third floor, apartment 321. Hurdelbrink also told Cunningham that two other one-bedroom apartments were available.

The next day, Sheryl Sims-Daniels, who is black, visited the Shorecrest. She told Hurdelbrink she was interested in one- and two-bedroom apartments. Hurdelbrink showed Sims-Daniels apartment 801, a two-bedroom, and told her the rent was $875 per month. Hurdelbrink also showed her apartment 321 and told her the rent was $525 per month. Hurdelbrink did not show Sims-Daniels any other apartments. When Sims-Daniels asked to fill out an application, Hurdelbrink told her she could not because of uncertainty about any apartments being available at the time.

MMFHC conducted two more tests. For the fourth test, Barry Zalben, who is white, met with Hurdelbrink at the Shorecrest on May 11, 1989, and asked about one- and two-bedroom apartments. Hurdelbrink showed him apartment 801, a two-bedroom apartment, and told him the rent was $875 per month. Hurdelbrink also showed Zalben two one-bedroom apartments: apartment 615, for which she told him the rent was $500 per month, and apartment 308, for which she told him the rent was $475 per month. Hurdelbrink told Zalben that all three apartments would be available sometime between June 1 and June 4. Hurdelbrink called Zalben on May 17, but he did not return her call.

Greg Thompson, who is black, spoke with Hurdelbrink at the Shorecrest about one hour after Zalben. Thompson asked to see one- and two-bedroom apartments and told Hurdelbrink that he would like to move in as soon as possible. Hurdelbrink only showed Thompson apartment 615 and told him the monthly rent was $525. Hurdelbrink brought him up to apartment 801 but did not take him inside; she told him the rent was $875 per month. Hurdelbrink told Thompson that both apartments would be available in July. But a white man named Walter Cain (who

was not a tester) ended up renting apartment 615 on May 20, paying $500 per month rent. Thompson asked to fill out an application, but Hurdelbrink told him he could not do so until he put down a deposit.

On the final test, Carl Hubbard, who is black, met Hurdelbrink at the Shorecrest on June 5. Hubbard asked to see one- and two-bedroom apartments; Hurdelbrink, claiming that she could not show him any two-bedroom apartments, showed him only one one-bedroom apartment. She told Thompson the rent for that apartment was $525 per month. She did not say when the apartment would be available, told Thompson his name could be placed on a waiting list, and told him also that he could fill out an application only when he was ready to rent. Hurdelbrink asked Hubbard several times about his "creditworthiness" although Hubbard assured her that his credit was fine.

Ed Valent, a white tester, met with Hurdelbrink at the Shorecrest about two hours after Hubbard. Valent told Hurdelbrink that he was interested in one- and two-bedroom apartments, and Hurdelbrink showed him apartment 204, which she told him would be available on June 15 for a rent of $475 per month. She had previously told him over the phone about two other two-bedroom apartments that would become available later. At the Shorecrest, Hurdelbrink told Valent that he could move into a one-bedroom apartment and then move into a two-bedroom apartment when one became available. When Valent asked for an application, Hurdelbrink gave him one.

Besides the testers, two other witnesses testified about their experiences attempting to rent at the Shorecrest during the spring of 1989. Marva Pattillo, who is black, met with Hurdelbrink at the Shorecrest on May 6 and asked about a two-bedroom apartment. Hurdelbrink showed Pattillo an eighth-floor apartment with a lake view. Pattillo told Hurdelbrink she loved the apartment and was "definitely interested" in it, and asked Hurdelbrink what the rent was. Hurdelbrink said she did not know the rent offhand but would find out. Hurdelbrink called Pattillo

several days later and told her the rent was $850 per month. When Pattillo returned to the Shorecrest on May 13 to see the apartment again, she told Hurdelbrink that she liked it and would need only a day or two to make her plans final. On May 15, Pattillo called Hurdelbrink to say that she would take the apartment. Hurdelbrink was not in, so Pattillo left a message. Over the next week to ten days, Pattillo called Hurdelbrink often at both the Shorecrest and at home, and left numerous messages at the Shorecrest. But Pattillo's effort was in vain; when she finally reached Hurdelbrink, Hurdelbrink told her the apartment had been rented. Hurdelbrink did show Pattillo another available apartment. But that apartment was smaller, in a state of some disrepair, and did not have as good a view. Pattillo eventually moved into an apartment in another building.

Maureen Wahl, who is white, was also looking for an apartment at about the same time Pattillo was. Wahl first visited the Shorecrest in mid-April. Hurdelbrink showed her some apartments, but she did not like what she saw. Wahl left Hurdelbrink her card and told Hurdelbrink to call when something else became available. Hurdelbrink called about a week later to say a larger apartment was available. Wahl met Hurdelbrink at the Shorecrest during the first week of May and looked at apartment 801, a large apartment with a "spectacular" (in Wahl's words) view of Lake Michigan.[1] Wahl liked the apartment immediately. She told Hurdelbrink she would take it, but did not fill out an application or leave a deposit.

Hurdelbrink called Wahl about two weeks later to tell Wahl that other people were interested in apartment 801,

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[1] Although Pattillo did not remember the number of the eighth-floor apartment she viewed, the government states that it was apartment 801. The defendants do not argue that Pattillo and Wahl did not view the same apartment, and the description of what Pattillo and Wahl saw—a large apartment on the eighth floor with a very good view of the lake—supports the inference that both viewed the same apartment.

and to ask Wahl if she was sure she wanted the apartment. Wahl said she did want the apartment. Sometime later, she followed up those words by mailing a check for July rent to Hurdelbrink. The record does not say exactly when Wahl sent the check; however, the check was dated May 29, so it is fair to infer that Wahl sent it near that date, which was after Hurdelbrink had told Pattillo the apartment had been rented. Wahl did not fill out an application or credit check form although the defendants testified that a completed application and successful credit check were part of their standard operating procedure before renting an apartment. Wahl did not sign a lease until August and did not move into the apartment until September.

The jury found that Hurdelbrink and Balistrieri had violated the Fair Housing Act by intentionally engaging in a pattern or practice of discrimination. Although none of the testers suffered any monetary loss, the jury awarded each tester $2,000 as compensation for the emotional distress they said they suffered upon finding out they had been discriminated against. The jury also awarded $5,000 to the MMFHC. The jury awarded no damages to Pattillo because the court had ruled before trial that the government could not seek damages for Pattillo or Kim Williams, another black person against whom the government alleged the defendants had discriminated. In fact, the court barred the government from presenting any evidence regarding Williams at all.

After a post-trial hearing before the court, the court enjoined Balistrieri from further discriminatory rental practices and ordered him to prepare a plan to establish nondiscriminatory rental procedures and ensure that all Shorecrest employees understood their obligations under the Fair Housing Act. The court did not enter an injunction against Hurdelbrink because by the time of the hearing she had resigned her position at the Shorecrest. The court did, however, impose civil penalties of $100 against Hurdelbrink and $2,500 against Balistrieri.

II.

The Fair Housing Act prohibits various forms of discrimination in the sale or rental of housing. Specifically, 42 U.S.C. § 3604 makes it unlawful

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race. . . .
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race. . . .
>
> * * *
>
> (d) To represent to any person because of race . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

Section 3614(a) provides that the Attorney General may bring a civil action to enforce the Fair Housing Act whenever he "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full and equal enjoyment of the rights secured by [the Act] or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance. . . ." In an action brought by the government, "the court" may "award . . . preventative relief, including a permanent or temporary injunction," § 3614(d)(1)(A); "award such other relief as the court deems appropriate, including monetary damages to persons aggrieved," § 3614(d)(1)(B); and "assess a civil penalty against the respondent," § 3614(d)(1)(C).

As we have mentioned several times, this case was tried to a jury. The government demanded a jury trial in its complaint; the defendants moved to strike this demand. The defendants seize on § 3614(d)'s reference to "the court" to argue that the district court erred by refusing to strike the government's jury demand. This textual argument does

not take the defendants far. In *Curtis v. Loether*, 415 U.S. 189 (1974), the Court held that a private party in an action under § 3612, which authorizes "the court" to grant damages, is entitled to a jury trial.

The seventh amendment provides that "in suits at common law . . . the right to trial by jury shall be preserved." This has been interpreted to mean that the right to a jury trial exists in suits to determine legal rights, as opposed to equity or admiralty suits. *Curtis*, 415 U.S. at 193 (citing *Parsons v. Bedford*, 3 Pet. 433, 446-47 (1830)). This includes legal rights created by Congressional enactment. *Id.*

The question in this case, then, is not whether § 3614(d)'s reference to "the court" indicates that a judge rather than a jury is to be the decisionmaker in a § 3614 action. The question, instead, is whether the government has the right to make a jury demand. The defendants, however, did not argue in their briefs that the seventh amendment's preservation of the right to trial by jury does not apply to the government. Therefore, they have waived that argument. See *Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1253 n.2 (7th Cir. 1989).

The defendants do argue that the government was not entitled to a jury trial because its suit was an equitable action for which no right to a jury trial exists. But § 3614(d) provides that the court may award "monetary damages to persons aggrieved." The government sought monetary damages to compensate the testers for the emotional distress they allegedly suffered as a result of the defendants' discrimination. The government's action was essentially a tort action for damages, for which the seventh amendment entitles a party to a jury trial. See *Curtis*, 415 U.S. at 195-96.

But the defendants perceive another hurdle. They argue that § 3614(d), despite its apparently plain language, does not allow the government to seek compensatory damages for an aggrieved party unless that party intervenes. Section 3614(d) was added to the Fair Housing Act in 1988. Before that amendment, the Act allowed the government

in a pattern or practice case to seek only "preventive relief," which the courts held to include only equitable relief. See *United States v. Mitchell*, 580 F.2d 789, 792-93 (5th Cir. 1978); *United States v. Long*, 537 F.2d 1151, 1152-55 (4th Cir. 1976). Both before and after 1988, the Act allowed suits by private parties in which those parties could recover "actual and . . . punitive damages." Compare 42 U.S.C.A. § 3612(c)(1) (1977) with 42 U.S.C.A. § 3613(c)(1) (Supp. 1992). Those "actual damages" included compensatory damages for injuries such as emotional distress. See *Curtis*, 415 U.S. at 195-96; *Long*, 537 F.2d at 1154.

According to the defendants, if Congress, against the statutory and caselaw background that existed in 1988, had wanted to provide for compensatory damages in suits by the Attorney General, it would have used the term "actual and punitive damages," a term the courts had already found authorizes an award of compensatory damages. Instead, Congress chose a different term, "monetary damages." This, say the defendants, shows that "monetary damages" does not include compensatory damages. Instead, it includes only monetary equitable relief such as restitution.

The government counters this with legislative history showing that when Congress amended the Fair Housing Act in 1988 to allow the Attorney General to seek monetary damages for aggrieved persons, it intended to allow courts to award relief "to all persons affected by the discriminatory housing practice" so as to avoid duplicative litigation. The defendants fire back that § 3614(e), also added in 1988, addresses this concern. That section provides that private parties may intervene in suits brought by the Attorney General, and that the court may grant such relief to the intervening party that is authorized by § 3613 (which explicitly includes "actual and punitive damages"). Allowing intervention avoids duplicative litigation, and the express reference to § 3613 allows the court to grant full relief to an aggrieved party who intervenes.

The defendants' argument is interesting, but we agree with the government that § 3614(d) allows the government to seek compensatory damages for an aggrieved person without that person's intervention. The Act before 1988 had already been interpreted to allow the Attorney General to seek equitable restitution. See *Long*, 537 F.2d at 1155. Why amend the Act to allow the Attorney General to recover something the Act already allowed him to recover? More important, despite the defendants' argument we think § 3614 is clear on its face. Congress in § 3614(d)(2) did not provide for the recovery of "restitution" or "equitable monetary relief"; it provided for the recovery of "monetary damages." The word "damages" has a commonly understood meaning: it generally connotes payment in money for a plaintiff's losses caused by a defendant's breach of duty, and is something different from equitable restitution. See *Rogers v. Loether*, 467 F.2d 1110, 1121-22 (7th Cir. 1972); cf. *Long*, 537 F.2d at 1155 (distinguishing "general monetary damages" from equitable remedies such as restitution); see also Black's Law Dictionary, 351-52 (1979). Moreover, nothing in § 3614 expressly requires an aggrieved party to intervene before the court may award damages in a case brought by the Attorney General. This does not, as the defendants suggest, render § 3614(e) superfluous. That section simply provides a means for aggrieved parties to protect their own interests in pattern or practice cases if they believe the Attorney General will not sufficiently protect those interests.

So, despite the failure of any aggrieved party to intervene, this case involved an action for compensatory damages, for which a jury trial is proper. Having determined that, we move on to the defendants' next argument, which is that the evidence was insufficient to support the jury's finding that they engaged in a pattern or practice of Housing Act violations. They first argue that because none of the testers were actually seeking apartments, there was no Fair Housing Act violation. That is incorrect. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Supreme Court held that falsely informing testers that apartments

are unavailable violates § 3604(d), which makes it illegal to misinform "any person" about the availability of housing. *Id.* at 373; see also *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990). Unlike § 3604(a), § 3604(d) does not require a bona fide offer; instead, § 3604(d) creates an enforceable right to truthful information for any person, not just bona fide apartment seekers. *Havens*, 455 U.S. at 373-74. This logic also extends to § 3604(b), which prohibits discrimination against "any person" in the terms or conditions of rentals and, like § 3604(d), does not require a bona fide offer. Therefore, offering black testers apartments at higher rental rates than those offered to white testers discriminates in the terms of rentals and violates the Act.

The defendants also argue that even if the Act did not require that the testers be bona fide applicants, the evidence was insufficient to show that they treated the black testers less favorably than the white testers. We disagree. Five sets of testers testified in this case. In each test, the black person was treated less favorably: he or she was either shown fewer apartments, quoted higher rents, or quoted later dates of availability; in some cases, all those occurred on the same test. Moreover, based on the testimony of Pattillo and Wahl, the jury could reasonably infer that Hurdelbrink made special efforts to rent to Wahl, a white person—going so far as to dispense with the usual requirements of a completed application and a credit check—to avoid renting to Pattillo, who was black. Thus the evidence showed that (at least in those cases) Hurdelbrink consistently treated the black apartment seekers somewhat less favorably than the white apartment seekers. Based on this evidence, the jury could conclude Hurdelbrink's treatment of the black testers violated the Fair Housing Act's prohibitions against racial discrimination in the terms or conditions for housing rental and against racially-motivated misrepresentations about housing availability.

The government, however, had to prove more than the fact that the defendants discriminated against several peo-

ple. Section 3614(a) empowers the Attorney General to sue if he has cause to believe that a "pattern or practice" of violations exists. Proof of isolated or sporadic acts of discrimination does not suffice to prove a pattern or practice. Rather, the government must present evidence from which the fact-finder can reasonably conclude " 'that . . . discrimination was the [defendants'] standard operating procedure—the regular rather than the unusual practice.' " *King v. General Electric Co.*, 960 F.2d 617, 623 (7th Cir. 1992); *United States v. DiMucci*, 879 F.2d 1488, 1497 n.11 (7th Cir. 1989) (both quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977)).[2]

Was the evidence here sufficient for the jury to conclude reasonably that discrimination was the defendants' "regular practice"? Based on similar evidence, we upheld a finding of a pattern of discrimination in *DiMucci*. In that case, the government proved six incidents in which black apartment seekers or testers were treated less favorably than their white counterparts. See 879 F.2d at 1492 & nn. 6-7. We held this showing was sufficient to establish a pattern or practice, commenting that "courts have granted relief based on fewer incidents than these." *Id.* at 1499 (citing *United States v. Pelzer Realty Co.*, 484 F.2d 438 (5th Cir. 1973)). As in *DiMucci*, the government here has shown that over a relatively brief period (a little more than a month) five black testers and Marva Pattillo visited the Shorecrest. In *each* case, the blacks were treated less favorably than their white counterparts, all being offered less favorable terms and, except in one instance, being shown fewer apartments. As in *DiMucci*, a jury could reasonably infer that this was more than "isolated or 'accidental' or sporadic." *Teamsters*, 431 U.S. at 336.

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[2] *DiMucci* was a Fair Housing Act case; *Teamsters* was a Title VII case; and *King* was an ADEA case. As *DiMucci* shows, the holdings of cases like *Teamsters* and *King* are relevant to the meaning of "pattern or practice" in a housing discrimination case. "Pattern or practice" is not "a term of art, but appears in several federal statutes, and is interpreted consistently therein." *DiMucci*, 879 F.2d at 1497 n.11.

King, which was decided after this case was briefed, could be read to indicate that the evidence here was not sufficient to support a finding of a pattern of discrimination. In *King*, we held that evidence of age discrimination against eleven employees at a GE plant in 1983 and 1984, and six employees in 1985, was not sufficient to show that a pattern of discrimination existed at GE during those periods. See 960 F.2d at 619, 626-627. However, a finding of pattern is a factual finding, and each case must stand on its own facts. Eleven instances of discrimination over two years, or six over one year at a large factory may very well be sporadic; but a jury may reasonably infer that when a defendant who in six chances over the course of little more than a month consistently discriminates, the discrimination is more than a sporadic occurrence. Moreover, *King* did not cite *DiMucci*, much less purport to overrule it. *DiMucci*, which is therefore still good law, requires the conclusion that the evidence in this case was sufficient to support a finding of a pattern of discrimination.

Balistrieri argues that even if the evidence is sufficient to show Hurdelbrink discriminated, there is no evidence to link her discrimination to him. However, the record contains testimony that Balistrieri was in charge of the Shorecrest, that Hurdelbrink and every other Shorecrest employee reported to him, that he had the final say concerning rents and rental practices, and that he was almost constantly present at the Shorecrest. We agree with the government that the jury could reasonably conclude from Balistrieri's presence at and control of the Shorecrest, and his extensive contacts with employees, that he knew about, and approved, Hurdelbrink's actions.

In any event, Hurdelbrink was acting as Balistrieri's agent. Her duties as agent were to show apartments and to do the other things—such as quoting rents and stating rental conditions—that go along with that job. Hurdelbrink was acting within the scope of her authority—either actual or apparent—when she committed her discriminatory acts. As we have previously held, in housing discrimina-

tion cases, "a principal is liable for the wrongful acts of its agent." *Hamilton v. Svatik*, 779 F.2d 383, 388 (7th Cir. 1985); see also *Coates v. Bechtel*, 811 F.2d 1045, 1051 (7th Cir. 1987). Therefore, Balistrieri is liable for Hurdelbrink's discrimination, even if he never expressly approved it.

The defendants' final argument regarding liability is that the district court should have required the government to prove its case by clear and convincing evidence rather than by a preponderance of the evidence. The preponderance standard, however, is the normal standard in civil cases, and has been applied in pattern and practice discrimination cases in other contexts. See *Teamsters*, 431 U.S. at 336 (Title VII; plaintiff must prove "by a preponderance of the evidence that [the] discrimination was the company's standard operating procedure"); *King*, 960 F.2d at 623 (ADEA). The defendants have given us no convincing reason why that standard should not apply here.

III.

The defendants also challenge the damage awards in this case. With regard to the testers, the defendants argue that there was insufficient evidence to show that they actually suffered any emotional distress as a result of the defendants' discrimination.

The evidence of emotional distress is not strong. All of the evidence of emotional distress came from the testers' own testimony. There was no corroboration from any source. Each of the testers testified generally about his or her being upset, humiliated, embarrassed or shamed. The substance of that testimony follows.

Davis testified that when she found out about the results of the tests she became angry and upset. The whole episode has made her "cautious and on edge," especially with white people. Her anger still existed at the time of trial because she believed "those kind of conditions still exist." However, she stated that her anger was not "extremely disabling."

Herbig also testified to being upset. She also felt nauseous, embarrassed, and ashamed that she had been treated differently. She still felt upset at the time of trial, and at times was physically upset and had lost sleep. She "generally [felt] bad, physically and emotionally."

Hubbard testified about his anger and frustration at the knowledge that he had been treated differently than a white person. He felt "hurt and disappointed." He also felt a "sense of helplessness and fear" that someday he would again be judged because of his race instead of his merits as a person. According to Hubbard, the defendants' discrimination made him "suspicious" about how he would be treated in the future and "wary" of going into situations in which he might be treated differently.

Sims-Daniels felt "disbelief and kind of a hurt feeling like feeling real sorry" upon finding out about the test results. She had a "gut feeling" in her stomach that wasn't comfortable. The episode had affected her relationship with her husband, children, and other family members because she would talk about her experience with those people. However, her feelings of disbelief or discomfort did not disable her or make her lose time from her job.

Thompson testified that when he found out the results of the test he was "surprised" and "didn't believe it." Those results "bother[ed] him" and made him less trustful of people; his experience made him wonder "what are [people] really thinking?" He worries about how his children will be treated. Hubbard characterized his experience with the test as "one of the worst things" that's happened to him.

We have long held that emotional distress caused by housing discrimination is a compensable injury under the Fair Housing Act. See *Seaton v. Sky Realty Co.*, 491 F.2d 634, 636-38 (7th Cir. 1974). However, a court may not presume emotional distress from the fact of discrimination. A plaintiff must actually prove that he suffers from emotional distress and that the discrimination caused that distress. Cf. *Carey v. Piphus*, 435 U.S. 247, 263-64 (1978)

(holding in a procedural due process case that "neither the likelihood [of emotional distress] nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused"); *Spence v. Board of Education*, 806 F.2d 1198, 1200-01 (3d Cir. 1986) (applying the same principle in a first amendment case).

The defendants argue that the testers' testimony was not sufficient to prove their emotional distress. They base their argument on *Biggs v. Village of Dupo*, 892 F.2d 1298 (7th Cir. 1990) and *Nekolny v. Painter*, 653 F.2d 1164, 1172-73 (7th Cir. 1981). In *Biggs*, the plaintiff was fired from his job as a police officer in retaliation for protected speech. He claimed that the firing caused him emotional distress, but the only evidence of that distress was his testimony that he was "affected emotionally" by his firing and that he "was concerned over 'the idea of my family going through it.' " 892 F.2d at 1304. Similarly, we held in *Nekolny* that "[a] single statement by a party that he was 'depressed,' 'a little despondent' or even 'completely humiliated'. . . [was] not enough to establish injury" when considered along with the facts in that case. 653 F.2d at 1172-73.

Biggs and *Nekolny* stand for the principle that " 'when the injured party provides the sole evidence, he must reasonably and sufficiently explain the circumstances of his injury and not resort to mere conclusory statements.' " *Biggs*, 892 F.2d at 1304 (quoting *Rakovich v. Wade*, 819 F.2d 1393, 1399 n.6 (7th Cir. 1987), *vacated on other grounds*, 850 F.2d 1180 (1988)). This is not to say, however, that an injured person's testimony can never be sufficient by itself, or in conjunction with the circumstances of the particular case, to establish damages for emotional distress. *Rakovich*, 819 F.2d at 1399 n.6; *Crawford v. Garnier*, 719 F.2d 1317, 1324 (7th Cir. 1983). For instance, in *Seaton*, we upheld an award for emotional distress despite the fact that the only direct evidence of emotional distress was the plaintiff's testimony that "I was humiliated. I was intimidated, not only as a person but as a man. He stripped

me of my right as a father to my kids." 491 F.2d at 636. This testimony is not qualitatively much different than that found insufficient in *Biggs* and *Nekolny*. But in *Nekolny*, we distinguished *Seaton* on the basis that "[t]he circumstances here do not approach the egregiousness of those found in *Seaton*. . . ." 653 F.2d at 1173.

Nekolny teaches that in determining whether the evidence of emotional distress is sufficient to support an award of damages, we must look at both the direct evidence of emotional distress and the circumstances of the act that allegedly caused that distress. Cf. *Carey*, 435 U.S. at 263-64 ("Distress . . . is customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff."). The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action; consequently, somewhat more conclusory evidence of emotional distress will be acceptable to support an award for emotional distress.

In housing discrimination cases, we have generally upheld awards for emotional distress despite the lack of detailed description of that distress. See, e.g., *Douglas v. Metro Rental Services, Inc.*, 827 F.2d 252, 256-57 (7th Cir. 1987) (holding evidence similar to that in this case was insufficient to sustain a $10,000 award for emotional distress but sufficient to sustain a $2,500 award); *Crumble v. Blumthal*, 549 F.2d 462, 467 (7th Cir. 1977) (remanding for consideration of emotional distress damages based on plaintiff's testimony that he was "humiliated and embarrassed" by the defendant's conduct); *Seaton*, 491 F.2d at 636-38. In *Seaton*, we seemed to suggest that racial discrimination, "which is one of the relics of slavery" is the type of action that one could reasonably expect to humiliate or cause emotional distress to a person. See 491 F.2d at 636.

However, the housing discrimination cases we have cited all involved plaintiffs who were actually seeking housing and deprived of that housing because of their race. There-

fore, on top of the racial discrimination, those cases involved the inevitable disappointment and frustration involved in being unable to obtain housing. Our case, on the other hand, involves testers. Should that make a difference? Perhaps. As we noted in *Dwivedi*, as an original matter, "the idea that [a tester's] legal rights have been invaded seems an arch formalism." 895 F.2d at 1526. Testers are investigators; "they suffer no harm other than that they invite in order to make a case against the persons investigated. . . ." *Id.* One could say that a person who suffers discrimination he himself invites to do a job he is paid for would generally be less likely to feel as humiliated by that discrimination than a bona fide home seeker who was doing nothing more than looking for a place to live. Therefore, one could reasonably conclude that a tester—as opposed to a bona fide home seeker—who claims damages for emotional distress should have to offer as proof of that distress more than the general, conclusory statements we have accepted in cases such as *Seaton*. In fact, a tester who helps expose discrimination could conceivably experience certain satisfaction in helping to correct wrongful conduct. Some testers could even be pleased with the success of their undercover operation.

Still, we hesitate to base a decision in a specific case on generalities. The jury is in the best position to evaluate both the humiliation inherent in the circumstances and the witness's explanation of his injury. Moreover, the jury is able to examine the witness personally; a jury may glean as much if not more about a witness's emotional state from the witness's demeanor than from his attempts to explain the nature of his injury in words. Given that deference to the jury, we think the testimony was sufficient in this case to support the jury's modest awards for emotional distress. Although the testers' testimony regarding emotional distress was somewhat general and conclusory (and strikingly consistent), it was more detailed than that found lacking in *Biggs* and *Nekolny*. The testers did suffer the indignity of being discriminated against because of their skin color. Although the evidence was minimal, it was sufficient.

The defendants also argue that we must reverse the award of damages to the testers because any emotional distress they suffered was not proximately caused by the defendants' actions. The testers did not know they had been discriminated against until Carla Wertheim, MMFHA's associate director, told them about the results of the tests. Only after this did any of the testers experience any anger, humiliation, or distress. According to the defendants, Wertheim's action broke the causal connection between the defendants' acts and the testers' injuries. Since Hurdelbrink apparently treated each tester decently and did not arouse any suspicion during the apartment inquiries and showings, defendants claim an intervening force actually caused the emotional distress.

We disagree. All Wertheim did was inform the testers about the true nature of the defendants' actions. As the government notes, discrimination is not always immediately apparent, and a victim must often see the full picture before he realizes he has been discriminated against. The fact that the victim does not suffer the full effects of the discrimination until he discovers the big picture does not change the fact that the defendant's discrimination was the primary cause of his harm.

The defendants also argue that we should reverse the award of damages to the testers because the district court did not give an instruction defining emotional distress. However, we believe the instructions given were adequate. The court told the jury that it could only award damages that were the "direct consequence" of the defendants' acts and that were the "direct result" of a Fair Housing Act violation, and that damages may include "emotional distress or mental anguish" caused by the defendants' conduct. Although these instructions did not define the terms "emotional distress" or "mental anguish," those terms are not so technical that they required definition.

The defendants also challenge the jury's award of $5,000 in damages to the MMFHA, claiming that there was insufficient evidence to support the award. In *Dwivedi*, we

stated that the "deflection of the agency's time and money from counseling to legal efforts directed against discrimination" is a sufficient injury to confer standing to sue on a fair housing agency. 895 F.2d at 1526. It follows that if the agency is able to establish this injury at trial, it may collect for it. In this case, Wertheim's testimony established that the MMFHA's time and money was deflected to legal efforts—conducting tests at the Shorecrest, and following up on the results of those tests. Wertheim testified about the staff time spent on that effort and the cost of that effort, and explained her figures to the jury. Based on Wertheim's testimony, the jury could reasonably find that the MMFHA had suffered damages of at least $5,000.

IV.

Balistrieri challenges the injunction entered against him on two grounds. First, he argues that the district court erred by placing the burden on him to prove that an injunction would not be necessary. But in *DiMucci*, we held that "the force of proof by the government that defendants have engaged in a pattern or practice of discrimination carries over to the remedial phase of the proceeding." 879 F.2d at 1498. This creates a presumption that an injunction is appropriate; the defendant can rebut this presumption "by showing that such relief is not necessary because there is little or no danger of current violations." *Id.*

Balistrieri argues, however, that because the finding of pattern or practice was made by a jury, it cannot carry over to the injunction hearing, an equitable proceeding. According to Balistrieri, the judge must make a separate finding that there is a continuing pattern or practice of discrimination, and the government bears the burden of proving this. We disagree, based on an analogy to employment discrimination cases. Where a claim under Title VII—an equitable claim—and 42 U.S.C. § 1981—a legal claim—are tried simultaneously before a judge and jury, the jury's

verdict binds the judge on all factual issues common to the two claims. *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1421 (7th Cir. 1986). The same principle should apply here. In effect, the parties were trying simultaneously equitable and legal claims (the actions for damages and for an injunction) that had a common factual issue—the existence of a pattern of racial discrimination. The jury's verdict, brought in before the judge had made any factual findings on the matter, established that the defendants had engaged in a pattern of discrimination. That finding controlled. At that point, then, this case became like *DiMucci*: the government at the liability stage of trial had shown that a pattern of discrimination existed. Under *DiMucci*, this created a presumption that injunctive relief was necessary, and placed the burden on Balistrieri to rebut that presumption.

Balistrieri also challenges the propriety of the injunction on several other grounds. First, he argues there was no evidence of discrimination. As we have already noted, there was sufficient evidence for the jury to find that Hurdelbrink's actions constituted a pattern of discrimination and that Balistrieri knew about and approved Hurdelbrink's actions. Balistrieri also argues that the injunction was improper because there was no finding he acted willfully or maliciously. However, those findings were not necessary. To enter an injunction, the district court had to find that Balistrieri had not rebutted the presumption that an injunction was appropriate. This, in turn, meant that Balistrieri had to show that the discriminatory practices were not continuing. *DiMucci*, 879 U.S. at 1498-99. The evidence at the injunction hearing showed that rental practices at the Shorecrest had not changed since the first trial. Based on this evidence, the district court did not clearly err in finding that Balistrieri had not met his burden of proving that injunctive relief was not appropriate.

V.

The government has cross-appealed the district court's decisions not to allow it to seek damages for Marva Pat-

tillo and Kim Williams, and to direct a verdict for the defendants on the issue of punitive damages. We agree with the government that both these decisions were erroneous.

We turn first to the decision not to allow the government to seek damages for Pattillo and Williams. In its complaint, the government alleged generally that the defendants had engaged in a pattern or practice of discrimination. The complaint also stated generally that "[p]ersons who have been the victims of defendants' discriminatory practices are aggrieved persons as defined in 42 U.S.C. § 3602(i)," and asked the court to award damages to those aggrieved persons. The complaint did not, however, specifically name any aggrieved persons. Rather, the government revealed the names of those people during the course of discovery.

In responding to Balistrieri's first set of interrogatories on May 23, 1990, the government stated that it did not know when the alleged pattern or practice of discrimination began or ended, but that it had evidence of specific instances of discrimination in April, May, and June of 1989. The government also identified the five black testers as aggrieved persons for whom the government sought damages. As discovery progressed, the government found that Pattillo was another person whom the defendants had allegedly discriminated against. In its Second Supplemental Response to Balistrieri's interrogatories, filed on July 27, the government disclosed Pattillo as an aggrieved person and described her contacts with the Shorecrest. Discovery progressed further, and the government found that Williams was another alleged victim of discrimination. On August 14, the government filed its Third Supplemental Response to Balistrieri's interrogatories, identifying Williams as an aggrieved person. The defendants deposed Williams the next day, the day on which discovery closed.

Trial was set for January 28, 1991. On December 21, 1990, the government filed its pretrial report, which mentioned Williams and Pattillo as aggrieved persons. A few days later, the defendants objected to the introduction of

evidence of any events that happened after June 5, 1989, the date the last tester visited the Shorecrest. On the first day of trial, however, Balistrieri shifted the focus of his objection, arguing that the government should not be able to seek damages for any victim of discrimination it was not aware of at the time it filed its complaint; in other words, Balistrieri argued that the government should not be able to seek damages for anybody but the testers. The district court held that Pattillo could testify, since she was allegedly discriminated against before June 5; however, the government could not seek damages for her. Williams could not testify, and the government could not seek damages for her because she was allegedly discriminated against after June 5.

The basis for the court's decision is not clear. The court seems to have relied on three grounds: the government could not seek damages for aggrieved persons whom it did not know of when it filed its complaint; the government could not seek damages for people discriminated against after June 5; and, the defendants did not receive timely notice that the government would be seeking damages for Williams and Pattillo. We do not think that any of these bases were sufficient to deny the government the opportunity to seek damages for Williams and Pattillo.

There was no reason to allow the government to seek damages only for aggrieved persons it knew about at the time it filed its complaint. Similarly, there was no reason to limit damages only to those allegedly discriminated against before June 5, 1989. The premise for both these conclusions seems to be that the pattern alleged lasted only until June 5, and included only discriminatory acts against the black testers. True, the complaint was filed in response to the tests. But nothing in the complaint supports the conclusion that the pattern or practice alleged was limited to those acts. The complaint did not limit the pattern to any particular dates, to any particular acts, or to acts against any particular people. The government's complaint notified the defendants of the claim against them; the government properly proceeded to flesh out

that claim through the discovery process. The government's interrogatory responses did not limit the time period involved; in fact, the government indicated that it did not know the precise dates that the pattern or practice of discrimination began or ended. The Fair Housing Act allows courts to award damages to persons aggrieved by a defendant's pattern of discrimination; nothing in the act demands, or even implies, that damages are proper only for people the government knows about at the time it files its complaint. The term "pattern or practice" itself implies an ongoing series of acts; it would be asking next to the impossible to demand that the government know about every victim of that alleged pattern before filing a complaint.

This does not mean, as the government itself concedes, that the defendants were not entitled to sufficient notice of the people for whom the government sought damages. The question thus boils down to whether the defendants had adequate notice of Pattillo and Williams so that they could defend against the government's attempt to seek damages for them. The district court's decision that the government provided inadequate notice of Williams and Pattillo is analogous to a decision whether to allow a party to amend a pleading. Generally, the decision whether to allow a plaintiff to amend his complaint is left to the district court's discretion. *Campbell v. Ingersoll Milling Machine Co.*, 893 F.2d 925, 927 (7th Cir. 1990). It is appropriate to apply that abuse of discretion standard to the court's decision here.

We conclude that the court has abused its discretion. The court did not really explain why it would not allow damages for Williams and Pattillo. Since the evidence in this case was not overwhelming, the court may have decided to draw a time line. In any event, the record reveals no real reason for not allowing the government to seek damages for Williams and Pattillo. The complaint put the defendants on notice that it was seeking damages for all aggrieved persons it might discover. The government told the defendants about Williams and Pattillo as soon as it

found out about them. This was not eleventh-hour notice. The government informed the defendants about Pattillo six months before trial, and about Williams more than five months before trial. The defendants were able to depose Williams; but even though they had ample time, they apparently chose not to depose Pattillo. There is no hint that the defendants were in any way prejudiced by the timing of the government's notice. Because there was no reason for denying damages for Pattillo and Williams, we must remand this case for a trial on that issue.

We must also remand for a trial on punitive damages. The district court directed a verdict against the government on punitive damages because the court could find no evidence of willfulness or wantonness indicating the defendants' desire to hurt or injure. That decision was error. Punitive damages are appropriate in cases of "reckless or callous disregard for the plaintiff's rights, [or] intentional violations of federal law. . . ." *Smith v. Wade*, 461 U.S. 30, 51 (1983); see also *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) (punitive damages are appropriate where a wrongful act is "intentional or malicious"). This does not mean that the defendant had to know he was violating the law. As we stated in *McKinley v. Trattles*, 732 F.2d 1320, 1327 (7th Cir. 1984), "[u]nder *Smith*, if the conduct upon which liability is founded evidences reckless or callous disregard for the plaintiff's rights or if the conduct springs from evil motive or intent, punitive damages are within the discretion of the jury."

Here there was sufficient evidence for the jury to award punitive damages under this standard. The jury could reasonably find from the defendants' systematic practice of treating black apartment seekers less favorably than whites that the defendants consciously and intentionally discriminated against potential black renters. It is true that the jury was not required to award punitive damages, for punitive damages are always discretionary. But it was error for the district court to remove this decision from the jury in the face of evidence of intentional discrimination. The

jury's discretionary moral judgment is "essentially unreviewable." *Id.* Therefore, we must remand for a new trial on the issue of punitive damages.

The district court did impose civil penalties on the plaintiffs. Civil penalties and punitive damages serve a common purpose: to punish wrongdoing. See *Tull v. United States*, 481 U.S. 412, 422 n.7 (1987). However, the award of civil penalties does not make up for the mistake of directing a verdict on punitive damages because while similar, the two are not identical. Punitive damages are paid to the plaintiffs; civil penalties are paid to the United States. But the district court may take the jury's award of punitive damages into account in making its discretionary decision whether to award civil penalties. See 42 U.S.C. § 3614(d)(1)(C) (court "may" award civil penalties). Because an award of punitive damages may affect the court's decision whether to impose civil penalties, we vacate the award of civil penalties to allow the district court to reconsider its decision regarding civil penalties on remand.

For the reasons set forth above, the district court's decision regarding liability and compensatory damages for the testers is affirmed. The court's decisions regarding damages for Pattillo and Williams, and regarding punitive damages are reversed. The award of civil penalties is vacated. We remand the case for further proceedings consistent with this opinion. Circuit Rule 36 shall not apply on remand.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA A07XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—11-24-92

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Milwaukee, Wisconsin 53202

April 16, 1991

Before

Hon. Thomas J. Curran
District Judge

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 90-C-27
	)	
JOSEPH P. BALISTRIERI and ANGELINA J. HURDELBRINK	)	
	)	
Defendant.	)	

ORDER

The trial on the merits of the above-captioned case having concluded, a verdict having been rendered by the jury, and the court having rendered a decision based on findings of fact and conclusions of law recited following a hearing to the court on the plaintiff's claims for civil penalties pursuant to 42 U.S.C. § 3614(a), and

for injunctive relief, the court ORDERS that the Clerk of Court shall enter a final judgment as a separate document. See Federal Rule of Civil Procedure 58. This judgment shall provide that:

> This action came on for trial before the Court and a jury, Honorable Thomas J. Curran, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,
>
> IT IS ORDERED AND ADJUDGED
>
> that defendants Joseph P. Balistrieri and Angelina J. Hurdelbring, having been found liable on the claims of the plaintiff United States of America, shall pay the following sums of money to the following aggrieved persons:

Carla Herbig	$2,000.00
Kimberly Davis	$2,000.00

Sheryl Sims-Daniels	$2,000.00
Gregory Thompson	$2,000.00
Carl Hubbard	$2,000.00
Metropolitan Milwaukee Fair Housing Council	$5,000.00

The defendants shall pay interest on these amounts from the date of judgment at the rate provided by law.

As for civil penalties, IT IS FURTHER ORDERED AND ADJUDGED that defendant Joseph P. Balistrieri shall pay plaintiff United States of America $2,500.000 and that defendant Angelina J. Hurdelbrink shall pay plaintiff United States of America $100.00.

As for permanent injunctive relief, IT IS FURTHER ORDERED AND ADJUDGED that:

I. Joseph P. Balistrieri, his officers, agents and employees, successors, and all persons in active concert or par-

ticipation with him, are permanently enjoined from:

A. Refusing to rent after the making of a bona find [sic] offer, or refusing to negotiate for the rental of, or otherwise making unavailable or denying, a dwelling to any person because of race or color;

B. Discriminating against any person in the terms, conditions, or privileges of rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race or color; and

C. Representing to any person because of race or color that any dwelling is not available for inspection or rental when such dwelling is in fact so a-

vailable.

II. To ensure that dwellings at the Shorecrest Hotel Apartments are rented on a nondiscriminatory basis:

A. Within 15 days of this Order, defendant Balistrieri shall file with the court proposed objective, uniform, and nondiscriminatory tenant application processing procedures and tenant selection criteria. Unless the court rejects the proposal, these procedures shall become effective 15 days after filing.

B. (1) Within ten days of the date of this Order, provide each such employee and agent with a copy of this Order and shall require each employee and agent involved in the renting of

units to read it;

(2) Within ten days of the date of this Order, obtain from each such employee and agent a signed statement by which the employee or agent avers, acknowledges, that he or she has read the provided materials, understands his or her legal responsibilities under this Order and the Fair Housing Act as amended, and will comply with both.

C. Defendant Balistrieri shall ensure that all employees or agents hired or assigned after the date of this Order to deal with the rental or management of defendant Balistrieri's dwellings are instructed in their

legal responsibilities under this Order and the Fair Housing Act as amended. Immediately upon hiring, new employees will be provided with a copy of this Order.

D. No later than thirty (30) days after the date of this Order defendant Balistrieri shall install and maintain a bulletin board in a prominent and conspicuous location easily accessible to the public. The following item shall be posted on this bulletin board:

1. A poster that complies with 24 C.F.R. § 110.25 which provides that: § 110.25 Description of posters.

(a) The fair housing poster shall be 11

inches by 14 inches and shall bear the following legend:

EQUAL HOUSING OPPORTUNITY

We do Business in Accordance with the Fair Housing Act

IT IS ILLEGAL TO DISCRIMINATE AGAINST ANY PERSON BECAUSE OF RACE, COLOR, RELIGION, SEX, HANDICAP, FAMILIAL STATUS (HAVING ONE OR MORE CHILDREN), OR NATIONAL ORIGIN

- In the rental of housing or residential lots.
- In advertising the rental of housing.
- In the financing of housing.
- In the appraisal of housing.
- In the provision of real estate brokerage services.
- Blockbusting is also illegal.

Anyone who feels he or she has been discriminated against should send a complaint to:

U.S. Department of Housing and Urban Development Assistant Secretary for Fair Housing and Equal Opportunity, Washington, D.C. 20410 or HUD Region [Area Office stamp]

IT IS FURTHER ORDERED AND ADJUDGED that this action IS DISMISSED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Milwaukee, Wisconsin 53202

April 12, 1991

Before

Hon. Thomas J. Curran
District Judge

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 90-C-27
	)	
JOSEPH P. BALISTRIERI and ANGELINA J. HURDELBRINK	)	
	)	
Defendant.	)	

COURT'S ORAL FINDINGS OF FACT AND CONCLUSIONS OF LAW APRIL 12, 1991.

THE COURT: Well, the court has reviewed its notes at the recess and some of the submissions that were previously handed to the court. The court is prepared at this stage to enter its findings of fact. First, the Shorecrest Hotel Apartments is a 116 unit apartment building occupying

1962 North Prospect Avenue in Milwaukee in the Eastern District of Wisconsin. Two, the defendant Joseph P. Balistrieri is the sole owner of the Shorecrest and has owned it since 1971.

Three, defendant Balistrieri employed defendant Angelina J. Hurdelbrink at the Shorecrest from August of 1988 through June of 1989. Four, that defendant Hurdelbrink's duties included showing apartments to prospective applicants and attempting to secure tenants for the apartments. Five, that in furtherance of its activities the Metropolitan Milwaukee Fair Housing Council conducted a series of five tests at the Shorecrest. The tests were designed to determine whether the Shorecrest discriminated on the basis of race. Each of the ten volunteer testers met with the defendants or defendant Hurdelbrink.

Six, that based on these tests the plaintiff, the United States of the America, named the Metropolitan Milwaukee Fair Housing Council and individual African American testers as the aggrieved persons. And these aggrieved persons have not intervened in this case. Seven, on February 5, 1991 the jury returned a special verdict answering questions as follows: question number one, do you find by a preponderance of the evidence that the defendants engaged in a pattern or practice of resistance to the full enjoyment by black persons of the rights guaranteed by the Fair Housing Act. The jury answered that yes.

And question number two inquired do you find by a preponderance of the evidence that the following persons have been harmed by defendant's violation of the Fair Housing Act and with respect to Carla

Herburg, they answered yes. And the amount awarded was $2,000. Kimberly Davis, they answered yes. And the amount also was $2,000. And the same response with respect to Sheryl Simms Daniels, Gregory Thompson, Carl Hubbert. With respect to the Metropolitan Milwaukee Fair Housing Council the response was yes and the award was $5,000.

The jury found that the defendants did engage in a pattern or practice of resistance to the full enjoyment of black persons of the rights guaranteed them under the Fair Housing Act. And the duty to obey the Fair Housing Act is nondelegable. The defendant Balistrieri is responsible for the acts of his employees and agents which are performed within the scope of their employment. And the defendant Hurdelbrink was acting within the scope of her normal duties when showing

the apartments to prospective tenants.

Now, the court listened very carefully to the testimony offered today as to whether or not the pattern and practice of past discrimination as found by the court jury is being continued by the defendant Joseph Balistrieri at the Shorecrest. As I stated at the outset the burden is upon the defendants to show that that is no longer the case. The evidence indicating that the pattern and practice continues is at best minimal. However, the burden is upon the defendants and while the court recognizes it's always difficult to prove a negative, there does appear to be an absence of any persuasive indications that the past pattern or practice of discrimination found by the jury has ceased.

The evidence indicating that seems to be refuted by the uncontroverted testimony that the procedures followed today are no

different than they were prior to the jury's findings. There doesn't appear to have been any overt acts or positive steps taken to establish any new pattern or practice. And under those circumstances the court is going to find that the defendants have not met their burden.

The court finds that the defendant Angelina J. Hurdelbrink is not continuing the past pattern or practice of discrimination at Shorecrest because she's no longer employed there. The court further finds that the defendant Joseph Balistrieri declared a taxable income of $34,875 on his 1988 federal income tax return. The court notes that of that amount $23,514 represents income from the Shorecrest property.

In addition to this income it appears from the exhibits that have been filed that the defendant Balistrieri owns the

following assets: Shorecrest Hotel Apartments, assessed value $255,000; Shepard Avenue property, assessed value $287,500; North Avenue property with the defendant's brother, John J. Balistrieri, with the assessed value of $122,000; Summit Avenue property with John J. Balistrieri as co-owner, assessed value $41,600.

There is no evidence in the record as to the amount, if any, of the encumbrances against these properties. However on examination of the 1988 statement shows that during 1988 mortgage interest payments of $142,742 were made which would indicate to this court that there is substantial encumbrances against one or all of the properties. The defendant Hurdelbrink owns approximately $169,000 in equity in various real and personal property. Apparently jointly owned with her husband.

As information conclusions of law the court is going to find that it has jurisdiction of this case pursuant to 28 United States Code, Section 1345 and 42 United States Code, Section 3614. The court further concludes that the Fair Housing Act 42 USC 3601 and 3604 makes it unlawful to refuse to sell or rent after the making of a bona fide offer or to refuse to negotiate for the sale or rental of or otherwise make unavailable or deny a dwelling to any person because of race, color, religion, sex, familial status or national origin.

And, B, to discriminate against any person in terms of conditions or privileges of sale or rental of a dwelling or in the provision of services or facilities in connection therewith because of race, color, religion, sex, familial status or national origin. D, to represent to any

person because of race, color, religion, sex, handicap, familial status or national origin that any dwelling is not available for inspection sale or rental when such dwelling is so in fact available. The duty to obey the Fair Housing Act is non-delegable.

And the plaintiffs have requested the imposition of civil penalties as well as injunctive relief. When a pattern and practice of housing discrimination is found, plaintiff may be awarded such civil penalties. The maximum penalty may not exceed $50,000 for the first violation. The factors that the court should consider in awarding such penalties are first the nature and circumstances of the violation, the degree of culpability, any history of prior violations, financial circumstances of the defendants, the goal of deterrence and any other matters as justice may re-

quire.

Considering each of these facts just listed, the court finds that as pointed out the jury has found that the defendants did engage in a pattern or practice of resistance to full enjoyment and while the acts complained of were not as aggressive as some that the court has been faced with, there is evidence that it occurred on more than one occasion and to more than one individual as the jury found.

With respect to the second factor the court has previously ruled with respect to the degree of culpability as between the two defendants. With respect to the history of prior violations based upon the record in this case there is no evidence of prior violations and for the purpose of determining the applicability of civil penalties here the court will find that this is the first violation.

The fourth factor, the financial circumstances, the court has imputed in its findings what evidence there is with respect to assets. While it's not clear as to the real financial circumstances of the defendants, there's sufficient evidence in this record to establish that in the court's judgment both defendants are in a position to respond to a reasonable award.

With respect to the fifth factor, the goal of deterrence, it's always an elusive factor. The jury has awarded damages against the defendants which certainly can be considered as a deterrence. Likewise this was a high profile case well-publicized and that means not only during the trial itself but also on more than one occasion prior to the commencement of the trial and that too must serve as a deterrence.

The court feels that there perhaps has been more notoriety attached to this fair housing case than any that this court has had. In fact I venture to say any that has occurred in the eastern district in my memory. The defendant Hurdelbrink has left the employ of the Shorecrest subsequent to these acts and there is evidence in the record that it was triggered by these allegations. The court also finds that the conduct of the defendant was not so outrageous as to require a maximum penalty.

Finally, the court in fashioning injunctive relief will lay down certain conditions and restrictions which will further serve as a deterrence. And at all times we must not lose -- lose sight of the fact that the cost of defense, even though one of the defendants represented himself in this matter, was and is sub-

stantial. Now the final factor requires that the court make certain observations and one is that this has been a fiercely contested case from the outset. The government by its aggressive approach has made it clear that it will vigorously pursue individuals whom they believe have violated the rights guaranteed by the Fair Housing Act.

The defendants on the other hand by their vigorous defense have caused the court to conclude that they feel that they were not in violation of this act. Now, under 423614D2 of the United States Code the United States may not be awarded fees and costs if it is the prevailing party. Therefore fees and costs cannot be taken into consideration. The court rules that the defendant Joseph Balistrieri will pay the United States of America a civil penalty of $2,500 and that the defendant

Angelina Hurdelbrink shall pay to the United States a civil penalty of $100.

Now the respect to the injunctive relief the burden of proof is as I previously indicated once the jury has made a finding that the defendants were carrying on a past practice or pattern of housing discrimination that burden then shifts to the defendants to rebut the resumption [sic]. That the plaintiff is entitled to affirmative injunctive relief by showing that such relief is necessary. In determining whether injunctive relief is appropriate or in fashioning a relief under an injunctive decree once the court has determined that such a remedy is appropriate, the court can consider the bona fide intention of the party found guilty or liable for discrimination and the effective discontinuance of the discriminatory practice in question, character of past

violations. This court without commenting further upon the jury's verdict finds that this was established as I have indicated.

It further finds that there is evidence of a discontinuance of discriminatory practice, but it is also clear that no really aggressive approach has been taken to effectively stamp out such practice and as I mentioned earlier the character of past violations are not as outrageous as this court has witnessed in other situations. In short, affirmative injunctive relief for past discriminatory practices is appropriate for the court believes that vestiges of prior discrimination may linger or remain to be eliminated.

Denial of an injunction is proper in cases where after hearing the defendant and examining particular circumstances the judge is fully satisfied that the defendant will not continue his unlawful con-

duct. While there has been some evidence produced that the conduct does not exist, the court feels that it would be appropriate at this stage for some injunctive relief to ensure that that is in fact the situation at the Shorecrest.

As I have previously ruled the issue regarding the adjoining of the defendant Angelina Hurdelbrink is moot and -- because she is no longer employed there and because the plaintiff was unable to articulate any specific need for injunctive relief. Therefore the injunctive relief will be awarded solely against the defendant Joseph P. Balistrieri.

Having considered these factors as to the defendant Balistrieri I conclude that the following affirmative injunctive relief is appropriate. The injunctive order will provide that based upon these findings and the conclusions of law recited

here Joseph Balistrieri, his officers, agents and employees and successor and all persons in active concert or participation with him are permanently adjoined from, A, refusing to rent after the making of a bona fide offer or refusing to negotiate for the rental of or otherwise making unavailable or denying a dwelling to any person because of race or color.

B, discriminating against any person in terms, conditions or privileges of rental of a dwelling or in the provision of service or facilities in connection therewith because of race or color. And, C, representing to any person because of race or color that any dwelling is not available for inspection or rental when such dwelling is in fact so available.

Second, to ensure that dwellings at the Shorecrest are rented on a nondiscriminatory basis, A, within 15 days of this

order the defendant Balistrieri is to file with the court proposed objective uniform and nondiscriminatory tenant application processing procedures and tenant selection criteria. Unless the court rejects the proposal, these procedures will become effective 15 days after filing.

D, within 10 days after the date of this order provide each employee and agent with a copy of this order. And the defendant shall require that each employee and agent included in the renting or involved in the rental of the units acknowledge having read the provisions of the Fair Housing Act as they apply to this facility. And within 10 days of the date of this order obtain from each such employee and agent a signed statement by which the employee acknowledges that he or she has read the provided materials, understands his or her legal responsibilities under

this order and the Fair Housing Act as amended and will comply with both.

The defendant Balistrieri shall further ensure that all employees or agents hired or assigned after the date of this order dealing with the rental or management of the defendant's dwelling units are instructed fully their legal responsibilities under this order and the Fair Housing Act as amended. This is to be done immediately upon hiring new employees who will deal with rental of housing units and these employees will be provided with a copy of this order and the amended Fair Housing Act.

And I am also going to require that no later than 30 days after the date of this order the defendant Balistrieri will install and maintain a bulletin board in a prominent and conspicuous location easily accessible to the public with the follow-

ing item posted on this bulletin board: A poster that complies with 24 CFR 110.25 which provides that the fair housing poster will be at least 11 inches by 14 inches and will bear the following language: Equal housing opportunity, we do business in accordance with the Fair Housing Act. It is illegal to discriminate against any person because of race, color, religion, sex, handicap, familial status or national origin in the rental of housing or residential lots, in advertising in the renting of housing, in financing of housing, in the appraisal of housing, in the provision of real estate brokerage services and blockbusting is also illegal. Anyone who feels that he or she has been discriminated against said -- against these provisions should send a complaint to the United States Department of Housing and Urban Development, Assistant Secretary for Fair

Housing and Equal Opportunities, Washington D.C. 20410 or to the HUD regional office and will provide the address of that office.

The court feels that based upon the testimony here that the defendants maintain that they are not engaged in any discriminatory ongoing practices. And if that is the case, then the provisions that are set forth in this injunctive relief will not serve -- work at cost purposes with their present operations. All right, that concludes it counsel. Court will stand in recess.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

January 20, 1993

Before

Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. HUBERT L. WILL, Senior District Judge.*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
Cross-Appellant,

Nos. 91-2379 and 91-2493

v.

JOSEPH P. BALISTRIERI and
ANGELINA J. HURDELBRINK,
Defendants-Appellants,
Cross-Appellees.

Appeal from the United States
District Court for the
Eastern District of Wisconsin.

90 C 27

Thomas J. Curran, Judge.

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by

Defendants-Appellants/Cross-Appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*Hon. Hubert L. Will, Senior District Judge for the Northern District of Illinois, is sitting by designation.

APPENDIX B

42 U.S.C. § 3601 Declaration of policy

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

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42 U.S.C. § 3602 Definitions.--As used in this subchapter--

(a) "Secretary" means the Secretary of Housing and Urban Development.

(b) "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(c) "Family" includes a single individual.

(d) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases

under Title 11, receivers, and fiduciaries.

(e) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.

(f) "Discriminatory housing practice" means an act that is unlawful under section 3604, 3605, 3606, or 3617 of this title.

(g) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

(h) "Handicap" means, with respect to a person--

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) a record of having such an impairment, or

(3) being regarded as having such an impairment,

but such term does not include current, illegal use of or addiction to a controlled substance as defined in section 802 of Title 21.

(i) "Aggrieved person" includes any person who--

(1) claims to have been injured by a discriminatory housing practice; or

(2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

(j) "Complainant" means the person (including the Secretary) who files a complaint under section 3610 of this title.

(k) "Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with--

(1) a parent or another person having legal custody of such individual or individuals; or

(2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

(l) "Conciliation" means the attempted resolution of issues raised by a complaint, or by the investigation of such complaint, through informal negotiations involving the aggrieved person, the respondent, and the Secretary.

(m) "Conciliation agreement" means a written agreement setting forth the resolution of the issues in conciliation.

(n) "Respondent" means--

(1) the person or other entity accused in a complaint of an unfair housing practice; and

(2) any other person or entity identified in the course of investigation and notified as required with respect to respondents so identified under section 3610(a) of this title.

(o) "Prevailing party" has the same meaning as such term has in section 1988 of this title.

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42 U.S.C. § 3604 Discrimination in sale or rental of housing and other prohibited practices.--As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful--

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

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42 U.S.C. § 3612 Enforcement by Secretary

(a) Election of judicial determination

When a charge is filed under section 3610 of this title, a complainant, a respondent, or an aggrieved person on whose behalf the complaint was filed, may elect to have the claims asserted in that charge decided in a civil action under subsection (o) of this section in lieu of a hearing under subsection (b) of this section. The election must be made not later than 20 days after the receipt by the electing person of service under section 3610(h) of this title or, in the case of the Secretary, not later than 20 days after such service. The person making such election shall give notice of doing so to the Secretary and to all other complainants and respondents to whom the charge relates.

(b) Administrative law judge hearing in absence of election

If an election is not made under subsection (a) of this section with respect to a charge filed under section 3610 of this title, the Secretary shall provide an opportunity for a hearing on the record with respect to a charge issued under section 3610 of this title. The Secretary shall delegate the conduct of a hearing under this section to an administrative law judge appointed under section 3105 of Title 5. The administrative law judge shall conduct the hearing at a place in the vicinity in which the discriminatory housing practice is alleged to have occurred or to be about to occur.

42 U.S.C. § 3613 Enforcement by private persons.--(a) Civil action--(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

(B) The computation of such 2-year period shall not include any time during which an administrative proceeding under this subchapter was pending with respect to a complaint or charge under this subchapter based upon such discriminatory housing practice. This subparagraph does not apply to actions arising from a breach of a conciliation agreement.

(2) An aggrieved person may commence a civil action under this subsection whether or not a complaint has been filed under section 3610(a) of this title and without regard to the status of any such complaint, but if the Secretary or a State or local agency has obtained a conciliation agreement with the consent of an aggrieved person, no action may be filed under this subsection by such aggrieved person with respect to the alleged discriminatory housing practice which forms the basis for such complaint except for the purpose of enforcing the terms of such an agreement.

(3) An aggrieved person may not commence a civil action under this subsection

with respect to an alleged discriminatory housing practice which forms the basis of a charge issued by the Secretary if an administrative law judge has commenced a hearing on the record under this subchapter with respect to such charge.

(b) Appointment of attorney by court--Upon application by a person alleging discriminatory housing practice or a person against whom such a practice is alleged, the court may--

(1) appoint an attorney for such person; or

(2) authorize the commencement or continuation of a civil action under subsection (a) of this section without the payment of fees, costs, or security, if in the opinion of the court such person is financially unable to bear the costs of such action.

(c) Relief which may be granted--(1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d) of this section, may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

(2) In a civil action under subsection (a) of this section, the court, in

its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

(d) Effect on certain sales, encumbrances, and rentals--Relief granted under this section shall not affect any contract, sale, encumbrance, or lease consummated before the granting of such relief and involving a bona fide purchaser, encumbrancer, or tenant, without actual notice of the filing of a complaint with the Secretary or civil action under this subchapter.

(e) Intervention by Attorney General--Upon timely application, the Attorney General may intervene in such civil action, if the Attorney General certifies that the case is of general public importance. Upon such intervention the Attorney General may obtain such relief as would be available to the Attorney General under section 3614(e) of this title in a civil action to which such section applies.

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42 U.S.C. § 3614 Enforcement by the Attorney General.--(a) Pattern or practice cases--Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the

full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.

(b) On referral of discriminatory housing practice or conciliation agreement for enforcement--(1)(A) The Attorney General may commence a civil action in any appropriate United States district court for appropriate relief with respect to a discriminatory housing practice referred to the Attorney General by the Secretary under section 3610(g) of this title.

(B) A civil action under this paragraph may be commenced not later than the expiration of 18 months after the date of the occurrence or the termination of the alleged discriminatory housing practice.

(2)(A) The Attorney General may commence a civil action in any appropriate United States district court for appropriate relief with respect to breach of a conciliation agreement referred to the Attorney General by the Secretary under section 3610(c) of this title.

(B) A civil action may be commenced under this paragraph not later than the expiration of 90 days after the referral of the alleged breach under section 3610(c) of this title.

(c) Enforcement of subpoenas--The Attorney General, on behalf of the Secre-

tary, or other party at whose request a subpoena is issued, under this subchapter, may enforce such subpoena in appropriate proceedings in the United States district court for the district in which the person to whom the subpoena was addressed resides, was served, or transacts business.

(d) Relief which may be granted in civil actions under subsections (a) and (b)--(1) In a civil action under subsection (a) or (b) of this section, the court--

(A) may award such preventive relief, including a permanent or temporary injunction, restraining order, or other order against the person responsible for a violation of this title as is necessary to assure the full enjoyment of the rights granted by this subchapter;

(B) may award such other relief as the court deems appropriate, including monetary damages to persons aggrieved; and

(C) may, to vindicate the public interest, assess a civil penalty against the respondent--

(i) in an amount not exceeding $50,000, for a first violation; and

(ii) in an amount not exceeding $100,000, for any subsequent violation.

(2) In a civil action under this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be

liable for such fees and costs to the extent provided by section 2412 of Title 28.

(e) Intervention in civil actions--Upon timely application, any person may intervene in a civil action commenced by the Attorney General under subsection (a) or (b) of this section which involves an alleged discriminatory housing practice with respect to which such person is an aggrieved person or a conciliation agreement to which such person is a party. The court may grant such appropriate relief to any such intervening party as is authorized to be granted to a plaintiff in a civil action under section 3613 of this title.

APPENDIX C

42 U.S.C. § 2000e-2 Unlawful employment practices

Employer practices

(a) It shall be unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

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24 C.F.R. § 100.80 Discriminatory representations on the availability of dwellings

(a) It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to

provide inaccurate or untrue information about the availability of dwellings for sale or rental.

(b) Prohibited actions under this section include, but are not limited to:

(1) Indicating through words or conduct that a dwelling which is available for inspection, sale, or rental has been sold or rented, because of race, color, religion, sex, handicap, familial status, or national origin.

(2) Representing that covenants or other deed, trust or lease provisions which purport to restrict the sale or rental of dwellings because of race, color, religion, sex, handicap, familial status, or national origin preclude the sale or rental of a dwelling to a person.

(3) Enforcing covenants or other deed, trust, or lease provisions which preclude the sale or rental of a dwelling to a person because of race, color, religion, sex, handicap, familial status, or national origin.

(4) Limiting information, by word or conduct, regarding suitably priced dwellings available for inspection, sale or rental, because of race, color, religion, sex, handicap, familial status, or national origin.

(5) Providing false or inaccurate information regarding the availability of a dwelling for sale or rental to any person, including testers, regardless of whether such person is actually seeking

housing, because of race, color, religion, sex, handicap, familial status, or national origin.

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24 C.F.R. § 125.101 Policy

Section 561 of the Housing and Community Development Act of 1987 established the Fair Housing Initiatives Program to strengthen the Department's effort to enforce title VIII of the Civil Rights Act of 1968 (title VIII) and to further fair housing. This program is intended to assist projects and activities designed to enhance compliance with title VIII and substantially equivalent State and local fair housing laws.

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24 C.F.R. § 125.401 Purpose.

The Private Enforcement Initiative of the Fair Housing Initiatives Program will provide funding to non-profit organizations and other private entities that are formulating or carrying out programs to prevent or eliminate discriminatory housing practices. The purpose of these awards is to assist in the developing, implementing, carrying out, or coordinat-

ing programs or activities designed to obtain enforcement of the rights granted by Title VIII or State or local laws that provide rights and remedies for alleged discriminatory housing practices that are substantially equivalent to the rights and remedies provided in Title VIII.

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24 C.F.R. § 125.403 Eligible Activities.

Projects that will be funded under the Private Enforcement Initiative may include (but are not limited to) the following:

(a) Conducting investigations of systemic housing discrimination.

(b) Professionally conducting testing or other investigative support for administrative and judicial enforcement;

(c) Linking fair housing organizations regionally in enforcement activities designed to combat broader housing market discriminatory practices; and

d) Establishing effective means of meeting legal expenses in support of litigation of fair housing cases.

No. 92-1690

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH P. BALISTRIERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

This case involves a pattern or practice of racial discrimination at petitioner's apartment building: Black persons were shown fewer apartments than white applicants, and they were quoted higher rents and later dates of availability for the apartments they were shown. The questions presented are:

1. Whether the discriminatory conduct violated the Fair Housing Act even though the applicants were "testers" who had no intention of actually renting apartments.

2. Whether the black testers may recover compensatory damages for the emotional distress caused by having been discriminated against on the basis of race.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 981 F.2d 916.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1992. A petition for rehearing was denied on January 20, 1993. Pet. App. 58a-59a. The petition for a writ of certiorari was filed on April 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner owns the Shorecrest Apartments in Milwaukee, Wisconsin, where Angelina Hurdelbrink was the rental agent. During April and May of 1989, the Metropolitan Milwaukee Fair Housing Council (Council) sent five sets of volunteer "testers" to the Shorecrest Apartments. A tester is a person who, without intending to rent an apartment, poses as a prospective renter in order to determine whether a property owner is complying with the requirements of fair housing laws. Pet. App. 1a-2a.

In each test, one white tester and one black tester visited the property within a short time of each other. The testers, who would indicate similar family and financial circumstances, inquired about the availability of apartments. Pet. App. 2a. Each time, the black tester was treated less favorably than the white tester in one or more ways: by being shown fewer apartments, quoted higher rents, or quoted later dates of availability. Pet. App. 2a-5a, 12a. When they discovered that they had been discriminated against, the black testers became angry and upset. See Pet. App. 15a-16a. In addition to the treatment of the testers, and at about the same time, Hurdelbrink made special efforts to rent an apartment to Maureen Wahl, who is white, to avoid renting it to Marva Pattillo, a black person who was interested in the same apartment. Pet. App. 6a-7a, 12a.

2. Congress has authorized the Attorney General to bring a civil action to enforce the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, whenever she has "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights

granted by [the Act]." 42 U.S.C. 3614(a). The United States sued petitioner and Hurdelbrink, alleging a pattern or practice of discriminatory rental practices in violation of Section 804 of the Act, 42 U.S.C. 3604.[1] Following a trial, the jury found that petitioner and Hurdelbrink had violated the Fair Housing Act by intentionally engaging in a pattern or practice of discrimination against black persons, and awarded each black tester $2,000 in compensatory damages for the emotional distress caused by the discrimination. See Pet. App. 7a.

3. The court of appeals affirmed. As to liability, the court stated:

> [T]he evidence showed that (at least in [the five test cases and the Pattillo-Wahl case]) Hurdelbrink consistently treated the black apartment seekers somewhat less favorably than the white apartment seekers. Based on this evidence, the jury could conclude Hurdelbrink's treatment of the black testers violated the Fair Housing Act's prohibitions against racial discrimination in the

---

[1] That statute, in relevant part, makes it unlawful:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race * * *.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling * * * because of race * * *.
>
> * * * * *
>
> (d) To represent to any person because of race * * * that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

42 U.S.C. 3604.

> terms or conditions for housing rental and against racially-motivated misrepresentations about housing availability.

Pet. App. 12a. The court further held that the government had proven a pattern or practice of discrimination, because "over a relatively brief period (a little more than a month) five black testers and Marva Pattillo visited the Shorecrest. In *each* case, the blacks were treated less favorably than their white counterparts, all being offered less favorable terms and, except in one instance, being shown fewer apartments." Pet. App. 13a. Finally, the court held that "the jury could reasonably conclude from [petitioner's] presence at and control of the Shorecrest, and his extensive contacts with employees, that he knew about, and approved, Hurdelbrink's actions," Pet. App. 14a, and that, in any event, petitioner was liable for Hurdelbrink's conduct on an agency theory, Pet. App. 14a-15a.

As to the damages issue, the court recognized that a person who suffers discrimination he himself invites may be less likely than a bona fide home seeker to feel humiliated by that discrimination. Pet. App. 19a. Nevertheless, the court noted that "[t]he jury is in the best position to evaluate both the humiliation inherent in the circumstances and the witness's explanation of his injury." *Ibid.* The court accordingly held that, "[g]iven that deference to the jury, * * * the testimony was sufficient in this case to support the jury's modest awards for emotional distress." *Ibid.*[2]

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[2] The court of appeals also affirmed the jury's award of compensatory damages to the Council, Pet. App. 20a-21a, affirmed the district court's injunction against further viola-

ARGUMENT

1. Petitioner renews his contention (Pet. 12-24) that there were no Fair Housing Act violations in this case because none of the testers was actually seeking an apartment. That contention is meritless.

a. This Court has held that Section 804(d) of the Fair Housing Act, 42 U.S.C. 3604(d), "establishes an enforceable right to truthful information concerning the availability of housing." *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 373 (1982). Falsely informing testers that apartments are not available violates that right. *Id.* at 373-374.[3] In this case, four out of five black testers were shown fewer apartments than were shown to white testers who visited the Shorecrest Apartments at about the same time. As to those apartments shown to white testers only, Hurdelbrink effectively represented to the black testers that the apartments were unavailable. That misrepresentation violated Section 804(d), which makes it illegal to misinform "any person" about the availability of housing. See, *e.g.*, *Village of Bellwood* v. *Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990).

In addition, at least two black testers were told that apartments would be available later than white testers were told the same apartments would be available. To tell a black tester in mid-May that an apartment would not be available until July, while

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tions of the Fair Housing Act, Pet. App. 21a-22a, and remanded for consideration of several damages issues, Pet. App. 22a-27a. Petitioner does not contest those determinations in this Court.

[3] This Court's explicit recognition of testers' rights in *Havens Realty* forecloses petitioner's argument (see Pet. 16-19) that a housing applicant must be both interested and qualified to complain of being discriminated against.

informing a white tester that the same apartment would be available at the beginning of June, see Pet. App. 4a, is literally "[t]o represent * * * that [a] dwelling is not available for * * * rental when such dwelling is in fact so available." 42 U.S.C. 3604(d). Because testers are protected by Section 804(d), see *Havens Realty*, 455 U.S. at 373-374, petitioner's argument that no Fair Housing Act violations were proven in this case is without merit.

b. Petitioner concedes that "black testers [were] provided in some cases with higher rental quotes or differing availability dates than their white counterparts." Pet. 19-20. In fact, the court of appeals found that "[i]n *each* case, the blacks were treated less favorably than their white counterparts, all being offered less favorable terms." Pet. App. 13a. That is a violation of Section 804(b), which makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling * * * because of race." 42 U.S.C. 3604(b).

Petitioner argues (Pet. 15) that "a tester, who has no genuine interest in becoming a resident in a given building or neighborhood[,] can have no personal stake in the specific terms of such residency." This Court rejected just such an argument in *Havens Realty*, explaining that a tester had been discriminated against when, because of his race, he was falsely told that an apartment was unavailable: "That the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of § 804(d)." 455 U.S. at 374. Similarly, when a housing agent offers (as Hurdelbrink did) to rent an apartment on less favorable terms to a black person

than to a white person, and that differential offer is made because of race, the black person has been discriminated against. That the black person may not actually avail himself of the housing opportunity does not change that fact, and so does not negate the violation of Section 804(b).

Petitioner's argument (Pet. 15-16) that Section 804(b) applies only to bona fide applicants is spurious. This Court recognized in *Havens Realty* that "[w]hereas Congress, in prohibiting discriminatory refusals to sell or rent in § 804(a) of the Act, 42 U.S.C. § 3604(a), required that there be a 'bona fide offer' to rent or purchase, Congress plainly omitted any such requirement insofar as it banned discriminatory representations in § 804(d)." 455 U.S. at 374 (footnote omitted). Congress likewise did not limit the applicability of Section 804(b) to bona fide applicants, but made it unlawful to discriminate against "any person" in the terms and conditions of rental.[4] Quoting higher prices and later dates of availability to black people discriminates on the basis of race in the terms and conditions of rental and, as in *Havens Realty*, the fact

[4] Petitioner contends that "the [court of appeals] ignored that this Court declined in *Havens* to conclude that a tester could assert a claim under § 3604(a) (refusing to deal or negotiate), although § 3604(a) contained the identical prohibition of actions against 'any person.'" Pet. 22. Petitioner misreads both the statute and this Court's opinion. While Section 804(a) does prohibit discrimination against "any person," its protections apply only "*after* the making of a bona fide offer." 42 U.S.C. 3604(a) (emphasis added). This Court stressed in *Havens Realty* that Congress specifically included that requirement only in Section 804(a). 455 U.S. at 374.

that the victims of that discrimination were testers is irrelevant. See Pet. App. 11a-12a.[5]

2. Petitioner suggests (Pet. 25-30) that testers should not be able to recover emotional distress damages. Petitioner cites no case, however, and we have found none, in which a victim of discrimination was barred from recovering compensatory damages simply because he may have been aware of the possibility of discrimination. Indeed, this Court recognized in *Havens Realty* that "[a] tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against," 455 U.S. at 373; it would be incongruous not to allow the tester to recover any actual damages suffered as a result of that statutory injury. Cf. *Carey* v. *Piphus*, 435 U.S. 247, 263-264 (1978) ("Distress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff.").

Thus, the only question is whether the evidence supports the award of compensatory damages in this case. Each of the black testers was angry about

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[5] Petitioner complains (Pet. 24) that the court of appeals' decision will "tie the hands of any property owner in terms of his ability to set prices, negotiate, or do anything other than give verbatim information and lockstep tours of his property to any potential tenant or purchaser." As this Court recognized in *Havens Realty*, however, "Congress has * * * conferred on *all* 'persons' a legal right to truthful information about available housing." 455 U.S. at 373 (emphasis added). That right imposes a concomitant obligation on property owners to provide that truthful information. Thus, to the extent petitioner seeks to discriminate against potential tenants on the basis of race, it is the Fair Housing Act, not the decision below, that "tie[s] [his] hands."

having been discriminated against. They expressed their feelings in terms of being upset, hurt, humiliated, embarrassed, and shamed. Some reported that the experience made them feel helpless, afraid, suspicious, and wary. Pet. App. 15a-16a. Four of the five testers stated that this was the first time they had ever been victimized by discrimination in a test. The jury, after hearing their testimony, determined that the testers had suffered emotional distress. The court of appeals correctly found that factual determination to be supported by the evidence, and upheld the jury's "modest" (Pet. App. 19a) award of $2,000 in compensatory damages to each tester. Further review of that determination is not warranted. See *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980) (relying on "settled practice" of not reviewing factual findings upheld by the court of appeals absent "exceptional circumstances").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1993